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JERNIH EQUITY SDN BHD

v.

TIARA LABUAN HOTEL SDN BHD

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAUS SHARIF JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: S-03-160A-2007]

C

19 AUGUST 2008

CIVIL PROCEDURE: *Pleadings - Statement of claim - Striking out - Sale and purchase of land - Purchaser failed to perform despite extensions of completion time - Whether vendor acting with utmost*

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fairness - Whether striking out fully justified - Part payment of purchase price - Whether creating any equity - Rules of High Court 1980, O. 18 r. 19

This was an appeal against the decision of the High Court striking

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out the appellant's writ of summons and statement of claim under O. 18 r. 19 Rules of the High Court 1980. The facts were that by an agreement dated 25 November 2002, the appellant had agreed to purchase the respondent's hotel for RM5,004,000. The appellant however was unable to complete the agreement,

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notwithstanding that some seven extensions of time had been accorded to them for the purpose. On 1 April 2004, the respondent wrote a letter giving the appellant until 21 April 2004 to pay the balance purchase price of RM4,122,913. The appellant did not comply and the respondent hence terminated the

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agreement, forfeited the monies already paid and requested for the return of the memorandum of transfer held in escrow by the appellant, which the appellant obliged. Nothing turned on the case until 16 January 2006, when the appellant wrote to the respondent demanding specific performance of the agreement. Thereafter, the appellant instituted proceedings and delivered its

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statement of claim which, upon the respondent's application, was struck out by the High Court. In this appeal, arguments were put forth by the appellant that a trial is necessary to investigate its claim, especially so when it has acquired an equitable interest in

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the subject property.

Held (dismissing appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) This is not a case in which any equitable interest was created. The facts showed that the respondent had acted with utmost fairness throughout the duration of the transaction. The respondent was anxious to put an end to the agreement which the appellant was plainly not in a position to complete and was exhausted by the seven extensions granted to the appellant. In accordance with the terms on which the seventh extension was granted, the respondent was therefore clearly entitled to forfeit all monies paid to it. (para 7)

(2) There are other considerable difficulties in the appellant's way of obtaining any form of equitable protection. The appellant's conduct of returning the memorandum of transfer held in escrow entitled the respondent as a reasonable businessperson to assume that the transaction had been brought to an end and that the appellant had accepted the forfeiture of monies paid under the agreement. The appellant is hence estopped from asserting that it is entitled to claim the said monies. Further, the appellant's delay of almost two years must surely bar any claim to relief. (para 8)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana membatalkan writ saman dan penyata tuntutan perayu di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Faktanya adalah melalui satu perjanjian bertarikh 25 November 2002, perayu bersetuju membeli hotel responden dengan harga RM5,004,000. Perayu bagaimanapun gagal menyempurnakan perjanjian, walaupun tujuh lanjutan masa telah diberikan kepada mereka untuk maksud itu. Pada 1 April 2004, responden menulis kepada perayu memberikannya sehingga 21 April 2004 untuk membayar baki harga belian sebanyak RM4,122,913. Tiada bayaran dibuat oleh perayu dan berikutnya responden menamatkan perjanjian, merampas wang yang sudahpun dibayar dan meminta supaya perayu mengembalikan memorandum pindahmilik, yang mana dipulangkan oleh perayu. Tiada apa yang berlaku sehinggalah 16 Januari 2006, bilamana perayu menulis kepada responden menuntut pelaksanaan spesifik perjanjian. Berikutnya, perayu memulakan

A prosiding dan menyerahkan penyata tuntutannya, yang mana, atas permohonan responden, telah dibatalkan oleh Mahkamah Tinggi. Dalam rayuannya di sini, perayu membangktikan hujah bahawa perbicaraan adalah perlu bagi menyiasat tuntutannya, sementelah suatu kepentingan berekuiti telah diperoleh olehnya terhadap
B hartanah yang berkenaan.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah

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(1) Ini bukan satu kes di mana kepentingan berekuiti tercipta. Fakta menunjukkan bahawa responden bertindak dengan sangat adil di sepanjang tempoh transaksi. Responden ingin memberi titik noktah kepada perjanjian yang jelas tidak dapat dipenuhi oleh perayu dan sudah keletihan dengan tujuh
D lanjutan masa yang diberikan kepada perayu. Berdasarkan terma-terma di mana lanjutan masa ke tujuh diberikan, responden dengan itu jelas berhak untuk merampas kesemua wang yang telah dibayar kepadanya.

E **(2)** Terdapat beberapa rintangan lain terhadap usaha perayu untuk mendapatkan apa jua bentuk perlindungan berekuiti. Kelakuan perayu dalam mengembalikan memorandum serahmilik yang disimpan secara escrow mewajarkan responden selaku peniaga yang munasabah untuk mengandaikan bahawa transaksi
F telahpun berakhir dan bahawa perayu telah menerima perampasan wang yang telah dibayar di bawah perjanjian. Perayu dengan itu diestop dari berhujah bahawa ia berhak untuk menuntut wang tersebut. Selain itu, kelengahan hampir dua tahun oleh perayu pastinya menjadi halangan kepada
G sebarang relif.

Case(s) referred to:
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
H *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC* ***(refd)***
Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168 SC ***(refd)***

Legislation referred to:
I Rules of the High Court 1980, O. 18 r. 19

For the appellant - Datuk Lawrence Thien (Patricia Hien with him); M/s Kwang, Lim & Azni
For the respondent - Colin Lau (Leonard Foo with him); M/s Foo, Teo & Assoc

[Appeal from High Court, Labuan; Civil Appeal No: SL22-01-2006]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] This appeal is directed against the order of the High Court in Labuan striking out the appellant's writ of summons and statement of claim under O. 18 r. 19 RHC 1980. It is well settled that the power exercisable under this rule of court being summary in nature may only be resorted to in plain and obvious cases: see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. Whether in a particular case it is plain and obvious that the pleading ought to be struck out, depends on the facts of that case.

[3] The facts here are as follows. By an agreement dated 25 November 2002 the respondent (defendant in the court below) agreed to sell its hotel to the appellant for a sum of RM5,004,000. The appellant paid an initial deposit of 10%. It paid further sums amounting to RM876,000 inclusive of interest. But the appellant was unable to complete the transaction within the time specified in the agreement. Seven extensions were sought and granted by the respondent to enable the appellant to pay the balance purchase price. In granting the seventh extension, the respondent wrote the following letter dated 1 April 2004 which, shorn of its formality, says this:

> We refer to your letter dated 30 March 2004.
>
> Upon considering your appeal for further extension of time, we hereby agree to extend the completion date for you to pay the balance purchase price together with interest in the sum of RM4,122,913.16 only ('said sum') by 21 April 2004 **without prejudice** to our rights contained:

A (i) in the Sale and Purchase Agreement;

(ii) the subsequent amendments thereto contained in our letter dated 27 May 2003 and your acceptance; and

(iii) in any other related documents/correspondent.

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A statement of account is attached for your reference.

We will not entertain any further request for extension from you. If we do not receive the said sum by 21 April 2004 we will proceed to terminate the Sale and Purchase Agreement for the C above properties and we shall forfeit all moneys paid to date as duly agreed by you **and** without further notice to you. In addition you must hand over the vacant possession of the properties to us.

D Kindly take note of the typo error in the second paragraph of your letter, payment ought to be on or before 21 April 2004 and not as stated 24 April 2004.

Kindly arrange the said sum to be remitted to Tiara Labuan Hotel Sdn Bhd's account in Bank Bumiputra Commerce Berhad in Kuala Lumpur account No. 1414-0028253-05-3 by the said E date.

Please take note that time is of the essence.

[4] The seventh extension also proved futile as the appellant did F not pay the balance purchase price within the extended time. On 21 April 2004, the respondent wrote to the appellant's then solicitors terminating the agreement and calling for the return of the memorandum of transfer and the issue document of titles held in escrow by them. There was also a request to withdraw the G private caveats lodged by them against the subject properties and to return possession of the hotel to the respondent. This letter was faxed at 7.05pm on the day in question. On 6 May 2004 the appellant's solicitors returned the memorandum of transfer to the respondent's solicitors and informed them that the caveats had H lapsed. Pursuant to its letter of 21 April 2004, the respondent forfeited the sums paid by the appellant to it.

[5] Nothing happened until 16 January 2006. On that date, the appellant wrote to the respondent asking it to specifically perform the agreement in question. Thereafter, the appellant instituted I proceedings and delivered its statement of claim, which on the respondent's application was struck out by the High Court.

[6] Before us learned counsel for the appellant sought to argue that a trial is necessary to investigate the claim made by it. He also submitted that the learned judge was wrong in striking out the appellant's statement of claim as this is not a plain and obvious case. An eleventh hour argument was mounted before us, inspired no doubt by appellate ingenuity, claiming relief from forfeiture. The essence of this argument is that the appellant had upon execution of the agreement made payments of the monies already mentioned and had therefore acquired an equitable interest in the subject property. By its act of termination what the respondent had done was to forfeit this interest.

[7] We find no merit whatsoever in this argument because the facts clearly show that the respondent had acted with utmost fairness throughout the duration of the transaction. No doubt, exhausted by its attempt to complete the transaction by giving seven extensions, it was anxious to put an end to an agreement which the appellant was plainly not in a position to complete. In accordance with the terms on which the seventh extension was granted, as evidenced by its letter of 1 April 2004, the respondent was clearly entitled to forfeit all monies paid to it. This is therefore not a case in which any equitable interest was created.

[8] Further, there are considerable difficulties in the appellant's way to obtaining any form of equitable protection or relief. In the first place, there is the appellant's conduct in response to the respondent's letter of 21 April 2004. If the appellant proposed any form of action to keep the transaction afoot it ought to have acted proactively upon receipt of that letter. Instead it chose to return the memorandum of transfer it held in escrow. In the absence of any other evidence pointing in the opposite direction (and we may add that there is none) the respondent was entitled as a reasonable businessperson to assume that the transaction had been brought to an end. It was also entitled to assume that the appellant had accepted the forfeiture by the respondent of the monies paid under the agreement. It was equally entitled to assume that it was free to deal with the subject property. The appellant is therefore estopped from asserting that it is entitled to claim the monies paid under the agreement. See, *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283. In the second place, since the appellant seeks equitable protection, it must show that it acted timeously to seek relief

against forfeiture. On equitable considerations the appellant's delay of almost two years must surely bar any claim to relief. See, *Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case* [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168.

[9] We have read the judgment appealed from and the pleadings and the documents with unusual care because we are mindful that the appellant had been deprived of having its day in court. But having done so, we are satisfied that the learned judge was entirely correct in making the order he did having regard to the factual substratum of this case. This is a plain and obvious case in which the appellant's pleading ought to be struck out.

[10] For the reasons already given, this appeal is dismissed. The appellant must pay the respondent costs of this appeal. The deposit shall be paid out to the respondent to account of its taxed costs. The orders of the High Court are affirmed.